

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DIW BOL KIIR, Petitioner, vs. DARIN YOUNG and ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Respondent.	4:20-CV-04167-KES ORDER GRANTING PETITIONER'S MOTION TO APPEAL WITHOUT PREPAYMENT OF FEES AND DENYING MOTION FOR CERTIFICATE OF APPEALABILITY
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Petitioner, Diw Bol Kiir, filed a writ of habeas corpus under 28 U.S.C. § 2254. Docket 1. This court entered an order of dismissal because Kiir admits in his most recent petition that “his petition is still unexhausted at the state level because he has not yet obtained a decision from the South Dakota Supreme Court.” Docket 8. Kiir filed a notice of appeal. Docket 9. Kiir moves to appeal without prepayment of fees and included a financial affidavit. Docket 11. There is also a pending motion for certificate of appealability. Docket 10.

The Eighth Circuit historically has looked to district courts to rule on in forma pauperis motions for appeal and has held that the filing-fee provisions of the PLRA do not apply to habeas corpus actions. *Malave v. Hedrick*, 271 F.3d 1139, 1140 (8th Cir. 2001). To determine whether a habeas petitioner qualifies for in forma pauperis status, the court need only assess (1) whether the

petitioner can afford to pay the full filing fee, and (2) whether the petitioner's appeal is taken in "good faith." 28 U.S.C. § 1915(a)(1), (3).

Kiir's notice of appeal appears to be taken in good faith. Kiir's prisoner trust account report (Docket 12) shows insufficient funds to pay the \$505.00 appellate filing fee; thus, his motion to appeal without repayment of fees (Docket 10) is granted. Because this court's order for dismissal was due to Kiir's failure to exhaust state court remedies, the motion for certificate of appealability (Docket 10) is denied.

Thus, it is ORDERED:

1. That the motion for certificate of appealability (Docket 10) is denied.
2. That Kiir's motion to appeal without prepayment of fees (Docket 11) is granted.

Dated December 18, 2020.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE